

TITLE 329 SOLID WASTE MANAGEMENT DIVISION

LSA Document #20-23

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from February 9, 2022, through March 11, 2022, on IDEM's draft rule language. IDEM received comments from the following parties:

Andrianna Hji-Avgoustis, Indiana Manufacturers Association (IMA)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: IDEM should be clear about the definition of “solid waste.” Materials that do not meet the definition of “solid waste” should be excluded from any “registration/verification/approval” process. At a minimum, the definition “solid waste” used by IDEM must include the federal definition found in 40 CFR 261.2, including the exclusions identified in 40 CFR 261.4(a). IDEM rules should clearly read those materials are not solid waste if they are excluded from the federal definition. As an example, there are many exemptions from the definition of “Solid Waste” in the federal rules that would identify treatment practices for spent materials that would not be “Solid Waste.”

In order for these spent materials to not be “Solid Waste,” they would need to meet the requirements of the applied exclusion, which in many of the items includes notification and quantification of the activity on an annual basis. The existing federal exclusions do not include a “registration/verification/approval” process. Federal exclusions that apply to reclamation specifically include 40 CFR 261.4(a)(17), (23), (24), (25), and (27).

IMA believes that IDEM should adopt at a minimum all existing federal exclusions, including the 2018 versions of 40 CFR 261.4(a)(24) and 40 CFR 261.4(a)(25). The materials covered by these exclusions are clearly not solid wastes. Some of the federal exclusions, as a requirement of use, require initial and periodic notification to the regulatory authority (IDEM) of the activity and exclusions (for example, see 40 CFR 261.4(a)(23)(ii)(C)). If IDEM does receive a notification that it believes is insufficient or inaccurate, IDEM can simply challenge if the facility is meeting the conditions of the exclusion. (IMA)

Response: Previous IDEM rulemaking actions have adopted most provisions of the federal definition of solid waste mentioned in this comment. The adoption of the July 1, 2015, CFR edition at 329 IAC 3.1-1-7 and the adoption of 40 CFR 261 at 329 IAC 3.1-6-1 include the federal definition of solid waste in 40 CFR 261.2 and exclusions in 40 CFR 261.4(a). Additionally, the adoption of recent Federal Register notices listed in 329 IAC 3.1-6-1(b) include federal requirements in 40 CFR 261 that became effective after July 1, 2015. Through the full adoption of the July 1, 2015, edition of 40 CFR 261 and subsequent Federal Register notices, the existing rules already include the other reclamation exclusions in 40 CFR 261.4(a) and no additional rulemaking action is necessary to adopt those federal exclusions.

In this rulemaking, IDEM is proposing amendments to incorporate by reference the May 30, 2018, U.S. EPA final rule that includes updates to the exclusions from the federal definition

of solid waste in 40 CFR 261.4(a)(24) and (25). IDEM has removed the state-specific requirements at 329 IAC 3.1-6-2(15) and 329 IAC 3.1-6-10 and is not including additional notification and approval requirements. IDEM will rely upon the default notification requirements in 40 CFR 240.42 and 40 CFR 261.4(a)(24) and periodic monitoring and compliance to ensure that facilities are meeting the conditions of the exclusion.

Comment: IMA opposes adding any additions to the federal definition or requirements. In the proposed rule, IDEM wants to add 329 IAC 3.1-6-2(15).

IDEM has provided no explanation or basis for why the federal minimum requirements—which are very robust—do not provide sufficient regulation of these materials. We do not support adding any additions to the federal definition or requirements. (IMA)

Comment: It is an unnecessary burden to require a reclamation facility or an intermediate facility to obtain an approval from the Commissioner before the facility can accept hazardous secondary materials that are managed under the exclusion at 40 CFR 261.4(a)(24). In the newly proposed 329 IAC 3.1-6-10(a), IDEM has proposed the following:

“(a) a reclamation facility or an intermediate facility must obtain approval from the commissioner before the facility can accept hazardous secondary materials that are managed under the exclusion at 40 CFR 261.4(a)(24). ...”

This is an unnecessary burden, as existing federal regulations include notification requirements by the generator and notification requirements by anyone who manages the material (40 CFR 260.42), including the reclamation facility. If IDEM is concerned about the reclamation of these materials that are being managed as raw materials, then they can ask for information after the initial notification. IDEM has provided no basis for adding additional requirements to pre-approve reclamation and intermediate facilities that are using the exclusion under 40 CFR 261.4(a)(24). (IMA)

Comment: If a rule must be adopted with an approval process for wastes that are sent to reclamation facilities, there needs to be a regulatory time limit for IDEM approval. If 329 IAC 3.1-6-10(a) and (b) are to be adopted, (b) should be modified to require a response within 30 days from IDEM or the reclamation facility is approved by default. (IMA)

Comment: The proposed rule has no ascertainable standards for determining whether a recycler can be approved. There are no defined standards in the rule to determine whether a recycler meets can meet 329 IAC 3.1-6-10(b)(2), which requires a recycler to have the “capability to properly manage hazardous secondary materials and comply with the requirements in 329 IAC 3.1-6-10(a).”

IDEM needs to define the criteria by which it will deem operations as acceptable or unacceptable. (IMA)

Comment: The proposed rule generator requirements for when the management of the material is stopped are not needed, as they are redundant with the federal regulation. 329 IAC 3.1-6-10(e) and (f) are redundant requirement to 40 CFR 260.42(b), which is already referenced in 40 CFR 261.4(a)(24)(vii). (IMA)

Response: IDEM has decided to remove the proposed additions to the federal requirements at 329 IAC 3.1-6-2(15) and 329 IAC 3.1-6-10 after the enactment of Public Law 120-2022 during the 2022 session of the Indiana General Assembly. The statutory amendments at IC 13-19-3-1(b) restrict IDEM’s flexibility for state-specific additions to the federal exclusion at 40 CFR 261.4(a)(24). As a result, IDEM will only incorporate by reference the federal

requirements without changes and will no longer include an approval process for reclamation and intermediate facilities or additional requirements for generators.

The explanation and basis for the additional state-specific requirements was provided in the Basic Purpose and Background section of the second notice of comment period (DIN: 20220209-IR-329200023SNA) for this rulemaking action. IDEM does not provide this explanation in the draft rule because proposed draft rule language is limited to the compliance requirements for regulated entities rather than explaining the reasons for those requirements.

Comment: Secondary Material Recyclers need to be able to dispose of some quantity of product it receives as waste. As written, 329 IAC 3.1-6-10(a)(2)(A) does not allow a reclamation facility to dispose of any de minimis amount of off-spec material that it cannot recycle from a company or of any waste that may not even be associated with the material from other companies.

IMA recommends that the proposed rule allow the Secondary Material Recycler to dispose of no more than 10% of the product it receives as waste from a company in a calendar year. (IMA)

Response: IDEM has decided to remove the requirement in 329 IAC 3.1-6-10(a)(2)(A) after the enactment of Public Law 120-2022 during the 2022 session of the Indiana General Assembly. The statutory amendments at IC 13-19-3-1(b) restrict IDEM's flexibility for state-specific additions to the federal exclusion at 40 CFR 261.4(a)(24). As a result, IDEM will only incorporate by reference the federal requirements without changes and disposal of de minimis amounts of non-recyclable product should be done in accordance with the current applicable requirements.

Comment: How can the requirements in the proposed rule apply to reclamation or generator facilities that are not located in the State of Indiana? Not all reclamation facilities used by Indiana generators exist in the State of Indiana. IMA would like for IDEM to explain what statutory authority it has for applying these new requirements to reclamation facilities that are not located in the State of Indiana. (IMA)

Response: IDEM has decided to remove the proposed additions to the federal requirements at 329 IAC 3.1-6-10 after the enactment of Public Law 120-2022 during the 2022 session of the Indiana General Assembly. The statutory amendments at IC 13-19-3-1(b) restrict IDEM's flexibility for state-specific additions to the federal exclusion at 40 CFR 261.4(a)(24). As a result, IDEM will only incorporate by reference the federal requirements without changes and will no longer require generators to use reclamation facilities approved by IDEM.

Comment: The Federal Register references proposed in 329 IAC 3.1-6-1 need to be reviewed regarding the use of the exact page and for completeness.

The reference in 329 IAC 3.1-6-1(b)(4) is difficult to find because the reference in the proposed rule does not include the first page of the Federal Register notice. A search for 83 FR 24668 on the U.S. Government Publishing Office website (www.gpo.gov) returns zero documents. A second search using the US GOVINFO web page (www.govinfo.gov) also does not return a document based on the 83 FR 24668 reference. However, the US GOVINFO search did show 83 FR 24664 - Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule as a second item in the search results. The reference should be updated to 83 FR

24664 – 83 FR 24671.

Use of 82 FR 60900 in 329 IAC 3.1-6-1(b)(3) creates a similar issue. Should 329 IAC 3.1-6-1(b)(4) in the proposed rule cite 82 FR 60894 – 82 FR 60901[?]. (IMA)

Response: Citations to the Federal Register in the Indiana Administrative Code only include the pages of the Federal Register notice that contain the applicable rule requirements of the CFR. Therefore, 329 IAC 3.1-6-1(b) lists the Federal Register pages that include rule amendments to 40 CFR 261 and not any other sections of the CFR. The background and descriptive portions of Federal Register notices, while useful for interested parties, do not include applicable requirements for regulated entities and do not serve a regulatory purpose for compliance.

According to Part 8-7(a)(3)(B) of the Administrative Rules Drafting Manual prepared by the Legislative Services Agency, agencies must include “Where copies of the matter incorporated by reference are available from the entity originally issuing the matter”. The Government Publishing Office and its associated web address (www.gpo.gov) are listed in the incorporation by reference paragraph because the Government Publishing Office is the entity originally issuing the matter and responsible for publishing both the CFR and the Federal Register. The Federal Register, CFR, and govinfo.gov are all accessible from the front page of the www.gpo.gov web page through direct hyperlinks or drop-down menus. IDEM recognizes that the general www.gpo.gov web address may not be the most straightforward method to obtain the text of a particular Federal Register notice, but the Government Publishing Office is ultimately the most appropriate federal government agency to reference for obtaining federal rule documents.

If using the www.govinfo.gov web site to access a Federal Register document, the “Citation” tab at the top of the search box can be used to find an individual Federal Register page. For example, searching for “83 FR 24668” yields the final rule notice for the Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule. Another method to find a Federal Register notice is through the federalregister.gov web site. For example, the Federal Register citation of “83 FR 24668” can be entered into the search box and the associated final rule document is the primary result.

Regulated entities and interested parties also can contact or visit IDEM to view any documents that are incorporated by reference.

Comment: 329 IAC 3.1-6-1(b) is confusing. It states the requirements of 40 CFR 261, as amended by a list of Federal Register notices. As listed, this Federal Register notice list does not include all the Federal Register notices that apply to 40 CFR 261.4. For example, after 83 FR 24664, EPA has published 83 FR 61552, Nov. 30, 2018, and 84 FR 5816, Feb. 22, 2019. Also, every Federal Register notice prior to 81 FR 85713 are not listed. This potentially raises questions about whether those amendments apply. Maybe 329 IAC 3.1-6-1(b) could be rewritten to state the following:

“Except as provided in section 2 of this rule, the requirements of 40 CFR 261 as of (insert date) apply to the identification and listing of hazardous waste except for: list of FRs that do not apply in Indiana.”

If there are specific Federal Register notices that are less stringent and Indiana does not want to adopt them, then they should be listed. (IMA)

Response: IDEM structures 329 IAC 3.1 by adopting an annual edition of the CFR in

329 IAC 3.1-1-7, which most recently is the July 1, 2015, CFR edition. In latter sections of 329 IAC 3.1, the rules state which CFR sections are incorporated by reference and also include Federal Register notices containing amendments to the CFR that were published after the annual CFR edition adopted in 329 IAC 3.1-1-7. This method prevents having to state the CFR edition with each reference to the CFR or include every Federal Register notice that amends a certain CFR section.

In 329 IAC 3.1-6-1, the requirements in 40 CFR 261 included in the July 1, 2015, CFR edition and the additional amendments to 40 CFR 261 included in the listed Federal Register notices are applicable in the state of Indiana. Any exceptions, additions, and substitutions to the materials incorporated by reference are listed in 329 IAC 3.1-6-2. IDEM is adopting the individual Federal Register notices in this draft rule because the rulemaking focuses solely on recent updates to the federal definition of solid waste for purposes of hazardous waste management. By adopting a newer annual edition of the CFR, the scope of the rulemaking would be expanded to other federal rules, which IDEM does not intend to do with this rulemaking.

For the requirements in 40 CFR 261.4, the applicable requirements are those included in the July 1, 2015, CFR edition and any later amendments to 40 CFR 261.4 in the listed Federal Register notices at 329 IAC 3.1-6-1(b). When IDEM adopts a more recent edition of the CFR, IDEM will delete these references to the Federal Register, as the updated CFR edition would contain the amendments in the Federal Register notices published prior to the adopted annual CFR edition.